

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Original & Affidavit of Mailing

77-1315

To be argued by
BERNARD J. FRIED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1315

UNITED STATES OF AMERICA,

Appellant,

—against—

PAUL LABRIOLA and THOMAS CONTINO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DAVID G. TRAGER,
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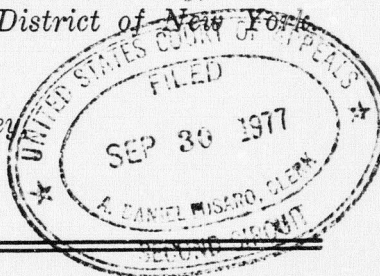


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PAUL LABRIOLA and THOMAS CONTINO,

Appellees.

BRIEF FOR THE APPELLANT

Preliminary Statement

This is an appeal by the United States of America from an order of the United States District Court for the Eastern District of New York (Costantino, J.), entered June 28, 1977, granting the motion of defendant-appellees Labriola and Contino to dismiss Indictment 75 CR 659(S) on the ground that the government violated the Interstate Agreement on Detainers, 18 U.S.C. App. See, *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3765 (May 9, 1977).

The district court incorrectly, we contend, treated an agreement between the government, Labriola and Contino, entered into at the court's suggestion, to adjourn the case until this Court decided the *Mauro* appeal, as somehow "equitably estopp[ing]" the government from arguing the non-retroactivity of *Mauro*.

We contend that, given the likelihood of the Supreme Court granting certiorari in the case of *United States v. Mauro*, *supra*, this appeal should be held in abeyance until *Mauro* is finally decided. However, in the event that this Court is unwilling to await a decision by the Supreme Court, we contend that the district court misapprehended the nature of the agreement among the parties and that the case should be remanded for a decision on the merits.¹

Statement of Facts

On September 8, 1975, a grand jury sitting in the Eastern District of New York returned an indictment (75 CR 659) charging Labriola, Contino and twelve others with conspiracy to violate 18 U.S.C. § 495 by forging and uttering U.S. Savings Bonds. On March 29, 1976, a superseding indictment (75 CR 659(S)), charging Labriola and Contino and two others with thirty-eight substantive violations of 18 U.S.C. § 495, was filed. This latter indictment is the subject of this appeal.²

¹ The district court did not rule on the merits of the government's position that there were factual distinctions between this case and *Mauro*. Acknowledging that "Contino's situation is somewhat the same [as the *Mauro* decision].", the government argued that Labriola's situation "is very different". (Transcript, May 12, 1976, pp. 8-10; A68-A70 [Govt. Appendix, hereinafter referred to as "A"]). Also, the district court did not rule with respect to the retroactivity of *Mauro*. Finally, the limitation on *Mauro* set forth in *United States v. Chico*, Dkt. No. 77-1016, slip op. 4275 (2d Cir. June 20, 1977), was neither raised nor decided. Since there has been no decision below with respect to these issues, if this Court determines that they should be reached at this time we respectfully request an opportunity to submit a supplemental brief concerning such issues.

² On March 30, 1976, on consent of the government, the original conspiracy indictment was dismissed as to Labriola, Contino and another defendant.

On March 30, 1976, both Labriola and Contino were brought, pursuant to writs of habeas corpus ad prosequendum from the Manhattan House of Detention ("Rikers Island") to the U.S. Courthouse for the Eastern District of New York for arraignment on this superseding indictment (75 CR 659(S)). Concededly, on March 30, 1976, both Labriola³ and Contino⁴ were then serving unrelated state sentences.

Following the March 30, 1976 appearance, Labriola, at his own request was kept in federal custody for one week rather than being returned that same day, to Rikers Island. (Transcript, March 30, 1976, p. 12; A59). Contino, however, requested "to go back to Rikers" and was returned that same day to Rikers Island (*Id.* at p. 13; A60).

Thereafter, on April 26, 1976, pursuant to a new writ of habeas corpus ad prosequendum, Labriola was taken from Sing Sing Prison into federal custody for trial which was scheduled for April 29, 1976.⁵ A new writ was also obtained for Contino, who was still confined at Rikers Island. Contino was taken from Rikers Island on April 29, 1976, and produced on that date in the

³ On December 9, 1974, Labriola was sentenced to a term of 4-8 years for robbery in the first degree by the Supreme Court of the State of New York (N.Y. County). He began service of this sentence on March 19, 1976, at Rikers Island.

⁴ On October 10, 1975, Contino was sentenced to a term of 6 months for promoting gambling in the second degree by the Supreme Court of the State of New York (Kings County). This sentence was to run consecutive to a federal sentence Contino was then serving. On January 30, 1976, he began serving the state sentence at Rikers Island.

⁵ Labriola had been transferred by state authorities from Rikers Island to Sing Sing Prison, Ossining, New York on April 20, 1976.

Eastern District for trial.⁶ On April 29, 1976, a jury was selected and the case adjourned to await the conclusion of another trial, then in progress before Judge Costantino.

On May 4, 1976, defendant Labriola moved to dismiss the indictment on the grounds that his return to state custody, without having been tried on the outstanding federal indictment constituted a violation of Article IV(e) of the Interstate Agreement on Detainers. A similar motion was made on May 12, 1976 by Contino. On May 12, 1976, the trial not yet having begun, the case was called for argument on the motion to dismiss.

Early in his argument, Steven Hyman, Esq., counsel for Contino, referred to the district court's decision in *United States v. Mauro*, which had just been rendered by Judge John R. Bartels,⁷ a decision from which the government was planning to take an appeal. At this point Judge Costantino opined that "dismissal is not proper." Following this statement, Mr. Hyman noted that if this Court were to affirm Judge Bartels, "our trial would have been for naught." However, as he put it, "if on the other hand it is reversed, your Honor would also be reversed and at that time should your Honor dismiss it, then we would have a trial." (Transcript,

⁶ Contino remained in federal custody until May 29, 1976 when he was released in \$1,500 bail, following his discharge from state custody to active probation.

⁷ Actually, Judge Bartels had not yet filed his opinion in the *Mauro* and *Fusco* case at the time of this argument: By orders dated April 26, 1976 (*Mauro*) and April 29, 1976 (*Fusco*), both entered on May 17, 1976, Judge Bartels had granted the defense motions to dismiss. 414 F. Supp. 358 (E.D.N.Y., 1976). As Judge Costantino correctly intimated (Transcript, May 12, 1976, p. 6; A66), the decision of one judge of a multiple district court does not bind other judges in the same district. E.g., *Hartley v. Sioux City New Orleans Barge, Inc.*, 247 F. Supp. 1015, 1018 (W.D.Pa., 1965).

May 12, 1976, p. 7; A66). During the ensuing argument, the prosecutor, a Strike Force attorney, pointed out significant differences between the posture of Labriola and Contino and contended that while Contino seemed to fit within the *Mauro* facts, Labriola's situation was distinguishable.⁸

After brief additional argument, Judge Costantino stated:

THE COURT: Under ordinary circumstances, since a jury has not been sworn, the problem could be resolved quite easily. But, these are not ordinary circumstances. We are faced with the Speedy Trial Rules.

If you are willing, and *I think* this may be the answer to it, if you are willing to waive your Speedy Trial Rules on behalf of your clients and on behalf of your client, do so and put this case over without my signing this motion. Put this case over until such time the Court of Appeals does decide the motion.

The same memorandum is before Judge Bartels for dismissing the indictment. That way I would know exactly whether or not you should continue or whether it should be dismissed (Emphasis added; *Id.* at p. 13; A73).

When asked if she had "any objection", the prosecutor stated: "I have no objection to that." (*Id.*)

Following the government's consent to this procedure suggested by the court, Judge Costantino inquired of

⁸ It appears that New York State had specifically requested the return of Labriola in connection with his then pending motion to correct his state sentence. Indeed, Labriola's sentence was reduced (or corrected) when he appeared in state court. (Transcript, May 12, 1976, pp. 9-10; A69-A70).

defense counsel whether Labriola and Contino would similarly consent. Contino's position was stated first:

MR. HYMAN [counsel for Contino]: Your Honor, I have had an opportunity to discuss this matter with Mr. Contino. I believe I can state Mr. Contino's position as follows:

We have been ready for trial and remained ready for trial. We have made motions that your Honor is considering with regard to the Speedy Trial Rule, which your Honor has already denied and we have subsequently made a motion for a dismissal under the Interstate Compact Act. It appears that from the discussion previously there is a case before Judge Bartels that has already been decided and the Government intends to pursue it in the Second Circuit.

It seems to me and to my client that in the interest of judicial economy and in the interest generally of everyone concerned that it would be foolhardy for us to go through a six to nine week trial only to have the matter possibly reversed as a result of the violation of the Interstate Compact. Therefore, without waiving any other rights other than the ones to start the trial today, my client is agreeable to putting off the trial date until such time the Second Circuit has reached a decision that would focus more light on this case. We of course reserve all the rights other than that we do in the interest of judicial economy and administration of justice, agree to an adjournment until the Second Circuit reaches that decision. (*Id.* at pp. 16-17; A76-A77).

Thereafter, Philip Peltz, Esq., counsel for Labriola stated that "Mr. Labriola can be presumed to have made the same statement". (*Id.* at p. 17; A77).

During a "status" call⁹ on November 12, 1976,¹⁰ following the October 26, 1976 decision of this Court in *Mauro*, the government advised the district court that it had requested authorization from the Solicitor General to petition for rehearing or rehearing *en banc*. At this time, the prosecutor again took the position that Labriola's situation "is very different" from the facts in *Mauro*. (Transcript, November 12, 1976, pp. 3-4; A97-A98). The district court, without objection, indicated it "will wait for the *en banc*. If it is granted, that is one thing, if it isn't granted, then the Court will have to do what is necessary." (*Id.* at p. 8; A102).

On December 10, 1976, at another "status" call (the record reflects that at this appearance only the prosecutor and counsel for Labriola were present), the court was advised that the government's petition for rehearing or rehearing *en banc* had been filed on December 9, 1976. Judge Costantino then ordered: "We had better put [this case] over". (Transcript, December 10, 1976, p. 3-A; A108). At this time, the following colloquy took place:

MS. MELLO [Counsel for Labriola]: May I just ask the government if they still intend, assuming that this decision remains the way it reads now, if they intend to argue that Labriola case is different from and should not be decided in the same way as that case pending in the Second Circuit?

MS. KATZ [Strike Force Attorney]: Yes your Honor. I believe that the factual situation in the

⁹ It appears from the record that neither Labriola nor Contino were present in court.

¹⁰ Prior to this, on November 1, 1976, Labriola although still represented by counsel filed a *pro se* motion entitled "Motion for Dismissal of Indictment" contending that since 180 days had elapsed since the filing of the superseding indictment, he had been denied a speedy trial. He also asserted that the indictment was defective in certain respects.

case or involving Mr. Labriola is very different than the factual situation involving Mr. Morrel [sic] and Mr. Rusco [sic] and would argue that before your Honor, and if need be, before the Second Circuit. (*Id.* at p. 3-3A; A107-A108).

The case was further adjourned.

On May 4, 1977, following this Court's March 15, 1977 denial of the petition for rehearing or rehearing *en banc* in the *Mauro* case, *supra*, all the parties again appeared in court. Prior to this appearance, the government had submitted a memorandum of law arguing the non-retroactivity of *Mauro*. At this hearing the court was advised that the United States was filing a petition for certiorari in *Mauro*. At the conclusion of this hearing, the court found that there was "good cause" to further adjourn the trial. (Transcript, May 4, 1977, p. 23; A131).

Thereafter, by Memorandum and Order dated and entered June 28, 1977, the district court granted the motion to dismiss the indictment for violating the Interstate Agreement on Detainers. In its opinion, in relevant part, the court noted (A34-A36):

The government concedes that both Labriola and Contino fall within the factual ambit of *Mauro*.¹¹ Nonetheless, it argues that the indictment

¹¹ The government did not so concede. Its concession was: "Concededly, both Labriola and Contino were serving State sentences on March 30, 1976 when brought to this court pursuant to writs of habeas corpus ad prosequendum, 28 U.S.C. § 2241(c)(5), for arraignment on Indictment 75 Cr. 659(S)." (Government's Memorandum of Law, dated April 19, 1977, p. 1, fn. 1; A136). Indeed, as discussed above, the government continually argued factual differences between Labriola and the defendants in the *Mauro* case. Moreover, with regard to Contino, at the original May 12, 1976 argument, the government acknowledged that Mr. Contino's situation is somewhat the same (as *Mauro*). (Transcript, May 12, 1976, p. 8; A68; see also p. 11; A71), but there was no concession as noted by the district court.

in this case should not be dismissed because *Mauro* should not be applied retroactively. This court need not decide the retroactivity question, since it finds that the government is equitably estopped from raising the issue in the context of the present case.

It is apparent from a reading of the transcript of the May 12, 1976 oral argument that all parties understood that this court intended that the Court of Appeals' ruling in *Mauro* would be dispositive of these motions. That intention was made abundantly clear when the court, in acceding to the parties' request¹² to reserve decision until the Court of Appeals decided *Mauro*, stated that by doing so "I would know exactly whether or not you should continue or whether it [the indictment] should be dismissed." (Tr., May 12, 1976, p. 13). The government stated that it had no objection to such a procedure, and it is now bound by that statement. Cf. *United States v. Alessi*, 536 F.2d 978, 981 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S.Ct. 394 (1976).

In addition, the defendants consented on May 12, 1976 to waive their speedy trial rights pending a decision by the Court of Appeals in *Mauro*. That waiver was predicated upon the understanding that the decision in *Mauro* would control the determination of the within motions (see Tr., May 12, 1976, pp. 16-17). The court agrees with de-

¹² This comment indicates a misapprehension of the proceedings on May 12, 1976 inasmuch as it was the court itself which suggested that the defendants "waive your Speedy Trial Rules on behalf of your clients . . . and put this case over without my signing this motion . . . until such time [as] the Court of Appeals does decide the [*Mauro* case]." Transcript, May 12, 1976, p. 13; A73).

fendant Contino that to allow the government to make its retroactivity argument after the lengthy delay involved in this case, particularly where the delay was for the specific purpose of awaiting the Court of Appeals decision in *Mauro*, would be unconscionable and would cast grave doubt on the validity of the defendant's waiver of their right under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (See Defendant Contino's Memorandum of Law, pp. 5-6).

This appeal by the government ensued.¹³

ARGUMENT

POINT I

This Appeal Should Be Held Pending Decision By The United States Supreme Court In *United States v. Mauro*, No. 76-1596, Petition For Certiorari Pending.

We submit that it is reasonable to expect that certiorari will be granted in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed*, 45 U.S. L.W. 3765 (Dkt. No. 76-1596, May 9, 1977).¹⁴ There-

¹³ Because of this ruling by Judge Costantino we did not raise, by motion for rehearing, the distinction spelled out in *United States v. Chico*, *supra*, which decision, we submit, directly controls appellee Contino's case.

¹⁴ A principal consideration for granting review on certiorari is where there is a conflict among the courts of appeals on the same matter. Rule 19(1)(b), Supreme Court Rules. Since the decision in *Mauro*, the First, Fifth and Sixth Circuits have each rejected the result reached in that case. See *United States v. Kenaan*, Dkt. No. 77-1014 (1st Cir., July 7, 1977); *United States v. Scallion*, 548 F.2d 1168 (5th Cir. 1977); and *Ridgeway*

[Footnote continued on following page]

after, following the expected grant of certiorari in *Mauro*, if the Supreme Court follows the First, Fifth and Sixth Circuits and rejects the *Mauro* holding, the district court's dismissal of the indictment, here, would turn out to have been clearly incorrect. And, even if the Supreme Court decides that the *Mauro* case was correctly decided, it may very well conclude, as did the Third Circuit, that "there seems little justification for retroactive application of the statutory construction ultimately adopted" (*United States v. Sorrell*, Dkt. No. 76-1647, Slip op. p. 8 (3d Cir., August 22, 1977)). Since this case will therefore probably be directly controlled by the Supreme Court's decision in *Mauro*, it does not appear unreasonable to hold this appeal pending such decision.¹⁵

We believe it appropriate to note that this suggestion appears in accord with, and contemplated by, the original agreement before the district court. The entire purpose of the agreement was as counsel for Contino aptly stated: "[I]t would be foolhardy for us to go through a six to nine week trial only to have the matter possibly reversed as a result of the violation of the Interstate Compact"

v. United States, Dkt. No. 76-2145, (6th Cir., July 13, 1977). On the other hand, the Third Circuit has followed the *Mauro* case. See *United States v. Sorrell*, Dkt. No. 76-1647 (3rd Cir., August 22, 1977) (*en banc*) and *United States v. Thompson*, Dkt. No. 76-1976 (3rd Cir., August 22, 1977) (*en banc*). The issue is also pending before the Ninth Circuit in *United States v. Adkins*, Dkt. No. 76-3526. Accordingly, certiorari will be most likely granted to enable the Supreme Court to resolve the conflict among the circuits with respect to this very important issue affecting the administration of justice within the federal system.

¹⁵ Of course, this proposal is predicated on the assumption that this Court will conclude, as we urge in Point II, *infra*, that the government is not "equitably estopped" from raising the retroactivity question or, for that matter further defenses to *Mauro*, e.g., the limitation established in *United States v. Chico*, *supra*, or the distinction originally urged at the May 12, 1976 argument in the district court.

(Transcript, May 12, 1976, p. 16; A76). Counsel further noted: "If on the other hand it is reversed, your Honor would also be reversed [if the court followed Judge Bartels' *Mauro* decision], *then* we could have a trial" (*Id.* at p. 7; A67). It strikes us as disingenuous to contend that this agreement did not, therefore, contemplate exhaustion of the appellate processes. And in light of this agreement, the waiver of speedy trial rights is a strange complaint especially in view of the fact that under the district court's decision in *Mauro*, if it had been applied by Judge Costantino here, the indictment would have been dismissed and no trial would have been held at all—at least not until after a reversal on appeal (if the government were ultimately successful). Indeed, it is certainly unlikely that the defendant-appellees would have bypassed that relief and pressed for a speedy trial.

Accordingly, the defendant-appellees should be held to their agreement and the case held for decision by the Supreme Court in *United States v. Mauro*, *supra*.

POINT II

The District Court Misapprehended The Nature Of The Agreement To Defer Decision On The Motion To Dismiss The Indictment.

Judge Costantino found that the parties had agreed to be bound by this Court's decision in *Mauro*, *supra*, and that the government was therefore "equitably estopped" from raising the issue of retroactivity of that decision as well as, by implication, raising other defenses to the *Mauro* decision. Following this logic, the court apparently deemed it unnecessary to consider the factual distinctions raised at the original argument on the motion to dismiss. We contend that Judge Costantino misapprehended the

nature of the agreement and dismissed the indictment without properly considering the issues raised.¹⁶

In his memorandum, Judge Costantino stated: "It is apparent from a reading of the transcript of the May 12, 1976 oral argument that all parties understood that this court intended that the Court of Appeals ruling in *Mauro* would be dispositive of these motions." (A34). This understanding is apparently inferred from a remark made by the district court when the court *itself* suggested that the parties agree to waive decision on the motion.¹⁷ At this point, the court noted that by adjourning the case "I would know exactly whether or not you should continue or whether it [the indictment] should be dismissed" (Transcript, May 12, 1976, p. 13; A73). However, preceeding this suggestion (and statement) by the court, was argument by the government that the *Mauro* case was factually distinguishable. (*Id.* at pp. 8-11; A68-A71). Thus it is hard to infer an intent by the government to abandon or not press other defenses to *Mauro*.

And, of course, that this was clearly understood by counsel for defendant-appellees is illustrated by the remark of Mr. Hyman (counsel for Contino), joined in by Mr. Peltz (counsel for Labriola), that "my client is agreeable

¹⁶ Because of this failure to treat the issues involving the merits of the government's position, both with respect to the government's attempt to distinguish *Mauro* and to limit it to prospective application, as well as the effect of the *Chico* decision (not actually pressed on the court due to the nature of its holding), we submit that the case should be remanded to the district court for plenary consideration of these issues. However, should this court disagree with us and determine that these issues should be reached on this appeal, we respectfully request an opportunity to submit a supplemental brief.

¹⁷ Judge Costantino incorrectly stated that he had "accede[d] to the parties request to reserve decision until the Court of Appeals decided *Mauro*" (A.35), when in fact it was his own suggestion (Transcript, May 12, 1976, p. 13).

to putting off the trial date until such time the Second Circuit has reached a decision that would *focus more light on this case*" (emphasis added; *Id.* at p. 17; A77). Indeed, the government maintained this position at the November 12, 1976 "status" call (Transcript, November 12, 1976, pp. 3-4; A97-A98). Moreover, at the December 10, 1976 "status" call counsel for Labriola inquired whether the government continued to contend that the *Mauro* case was factually distinguishable, thus evidencing an awareness by counsel that the government had not bound itself to accept *Mauro* without distinction or defense. (Transcript, December 10, 1976, p. 8; A107).

Moreover, the prosecutor did not have the power to bind the government to accept the then anticipated appellate decision in the *Mauro* case, without further analysis of that holding. Such agreement, in the nature of a confession of error,¹⁸ would not be binding on the district court. *Cf. United States v. Galante*, 547 F.2d 733, 736, f.n. 2. (2d Cir. 1976). Surely, in a matter as important to the administration of justice as the dismissal of an indictment *with prejudice*, the court has the independent obligation, indeed the duty, to perform the judicial function of determining whether the purported "confession of error" is in order. See, *United States v. Schwander*, 419 F.2d 812, 813 (5th Cir. 1970). Or as the Supreme Court put it in *Young v. United States*, 315 U.S. 257, 259 (1942), "a confession [of error] does not relieve this Court [and similarly, we contend, a district court] of the performance of the judicial function." See, also *Sibron v. New York*, 392 U.S. 40, 58 (1967). While the government's confession is "entitled to great weight", *Young v. United States*, *supra*, at p. 258, such confession

¹⁸ In effect, the government, according to the district court's logic, would be confessing error by its so-called concession that there had been a violation of the Interstate Agreement on Detainers, as construed by *Mauro*.

is simply not binding on the court. *Cachoian v. Untied States*, 452 F.2d 548 (5th Cir. 1971). The district court, therefore, should have treated the questions raised. Its failure to do so was, we submit, error and the case should be either held until the Supreme Court decides the *Mauro* *Supra* issue, as urged in Point I, ~~*infra*~~, or remanded for a decision on the merits by the district court.

CONCLUSION

The appeal should be held pending decision by the Supreme Court in *United States v. Mauro*, *supra*, or, in the alternative the order of the order of the district court should be vacated and the case remanded for a decision on the merits.

Dated: Brooklyn, New York
September 27, 1977

Respectfully submitted,

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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 30th day of Sept. 19 77 he served a copy of the within
Brief for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

Philip Peltz, Esq. Steven Hyman, Esq.

26 Court Street 370 Lexington Ave.

Brooklyn, N.Y. 11201 New York, New York

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this
30th day of Sept. 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24466824
Qualified in Kings County
Commission Expires March 30, 1979